

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4 NORMA J. MAXWELL, )  
 5 Plaintiff, ) No. 03:12-cv-00475-HU  
 6 vs. )  
 7 CAROLYN W. COLVIN<sup>1</sup>, ) **FINDINGS AND RECOMMENDATION**  
 Commissioner of Social Security, )  
 8 Defendant. )  
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 27 <sup>1</sup>Carolyn W. Colvin became acting Commissioner of Social  
 Security on February 24, 2013. Therefore, pursuant to Federal Rule  
 28 of Civil Procedure 25(d), she is automatically substituted for  
 Michael J. Astrue as Defendant in this case.

1 - FINDINGS & RECOMMENDATION

HUBEL, United States Magistrate Judge:

The plaintiff Norma J. Maxwell (also called Norma Jean Smith in some of the medical records) seeks judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision denying her applications for Disability Insurance ("DI") benefits under Title II of the Social Security Act, 42 U.S.C. § 1381 *et seq.*, and Supplemental Security Income under Title XVI of the Act. Maxwell argues the Administrative Law Judge ("ALJ") erred in failing to develop the Record properly, failing to consider all of the evidence, and finding Maxwell is able to work. See Dkt. # 14.

### ***I. PROCEDURAL BACKGROUND***

Maxwell protectively filed her applications for DI and SSI benefits on January 7, 2008, at age 52, claiming disability since December 31, 2001, due to anxiety, back pain, memory problems, and a "learning impairment." (A.R. 10, 13, 111-15, 128<sup>2</sup>) Maxwell's applications were denied initially and on reconsideration. (A.R. 52-60, 64-70) Maxwell requested a hearing, and a hearing was held on October 21, 2010, before an ALJ. Maxwell appeared *pro se* at the hearing. She testified on her own behalf, and a Vocational Expert ("VE") also testified at the hearing. (A.R. 24-47) On December 9,

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<sup>2</sup>The administrative record ("A.R.") was filed electronically using the court's CM/ECF system. Dkt. #11 and attachments. Pages of the A.R. contain at least three separate page numbers: two located at the top of the page, consisting of the CM/ECF number (e.g., Dkt. #11-3, Page 16 of 48) and a Page ID#; and a page number located at the lower right corner of the page, representing the numbering inserted by the Agency. Some pages also contain a page number inserted by the office supplying the records. Citations herein to "A.R." refer to the agency numbering in the lower right corner of each page.

1 2010, the ALJ issued his decision, denying Maxwell's applications  
2 for benefits. (A.R. 10-19) Maxwell appealed the ALJ's decision,  
3 and on February 28, 2012, the Appeals Council denied her request  
4 for review (A.R. 1-5), making the ALJ's decision the final decision  
5 of the Commissioner. See 20 C.F.R. §§ 404.981, 416.1481. Maxwell  
6 filed a timely Complaint in this court seeking judicial review of  
7 the Commissioner's final decision denying her applications for DI  
8 and SSI benefits. Dkt. #2. The matter is fully briefed, and the  
9 undersigned submits the following findings and recommended  
10 disposition of the case pursuant to 28 U.S.C. § 636(b)(1)(B).  
11

## 12 ***II. FACTUAL BACKGROUND***

### 13 ***A. Summary of the Medical Evidence***

14 On February 20, 2002, Maxwell saw family practitioner Cynthia  
15 Caraballo, M.D. at Providence Medical Group/Newberg ("Providence")  
16 for a complaint of night sweats. Notes indicate Maxwell had a  
17 history of alcohol abuse, and had drunk most recently the previous  
18 evening. Maxwell had been in a physically abusive relationship,  
19 but currently was "safe," and living with her mother. Her night  
20 sweats were thought to be "[l]possible early menopausal changes."  
21 She was diagnosed with PTSD "secondary to severe domestic violence  
22 and trauma," and was referred to a domestic violence counselor.  
23 Various lab tests were ordered to evaluate Maxwell's condition.  
24 (A.R. 224-26, 229-32)

25 Maxwell saw Dr. Caraballo for followup on March 13, 2002.  
26 Maxwell reported that her hot flashes were "improving with herbs."  
27 (A.R. 222) She had a normal gynecological exam, and was directed  
28

1 to return for followup in one year. She also was advised to stop  
2 smoking. (A.R. 222-23, 227-28)

3 The next evidence in the Record of any type of medical care is  
4 more than three years later, on November 3, 2005, when Maxwell saw  
5 family practitioner Eleanor Sims, M.D. at the Virginia Garcia  
6 Memorial Health Center ("VGMHC"), for complaints of difficulty  
7 sleeping, and feeling "sad most of the time with crying episodes."  
8 (A.R. 290) Maxwell stated she felt very anxious when she went out  
9 in public. Her energy level was low, and she was waking up  
10 multiple times each night. She was diagnosed with depression, and  
11 the doctor prescribed the antidepressant Celexa. (*Id.*) There are  
12 no followup notes until fourteen months later, when Maxwell saw  
13 Dr. Sims on January 25, 2007. Maxwell was tearful and complained  
14 of difficulty sleeping. The doctor prescribed "generic Wellbutrin"  
15 for depression and anxiety. (A.R. 287-88)

16 Maxwell was seen in the ER on June 11, 2007, for right-sided  
17 back pain, with followup by family practitioner Andrew Mendenhall,  
18 M.D. at Providence on June 15, 2007. He prescribed methocarbamol  
19 (used "as an adjunct to rest, physical therapy and other measures  
20 for the relief of discomfort associated with acute, painful  
21 musculoskeletal conditions"<sup>3</sup>), and salsalate (NSAID used to treat  
22 arthritis and related rheumatic disorders). On June 19, 2007, she  
23 was switched to Flexeril (a muscle relaxer). (A.R. 218; 221-23)

24 On June 29, 2007, Maxwell saw Certified Medical Assistant  
25 (CMA) Becky Bangle at Providence for followup. Maxwell stated her  
26 pain was "9 out of 10 intensity all the time." (*Id.*) She stated

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27  
28 <sup>3</sup>Medication information in this opinion is taken from RxList-  
The Internet Drug Index, [www.rxlist.com](http://www.rxlist.com).

1 her pain improved somewhat with a "hot bath and with dose of her  
2 husband's Oxycontin [oxycodone] 5 mg." (*Id.*) Maxwell stated  
3 naproxen made her nauseous, and her muscle relaxant medications  
4 were not helping. She described the pain as mostly in her right  
5 flank, but radiating up to her upper right back, and down to her  
6 right lumbar region. (*Id.*) Notes indicate Maxwell was 5'6" tall,  
7 and weighed 155.4 pounds. She smoked cigarettes, and was "not  
8 ready to quit." (*Id.*) Bangle noted Maxwell appeared to be  
9 uncomfortable lying on her left side on the exam table. Spasms  
10 were observed on her right side, and she exhibited "[h]unched  
11 shoulders with head forwards[.]" (A.R. 219) She had decreased  
12 lumbar extension due to pain, but other ranges of motion were  
13 normal. Bangle also noted Maxwell was "depressed." (*Id.*) Bangle  
14 administered an injection of Toradol for pain relief, and directed  
15 Maxwell to continue taking her Flexeril and salsalate, and use heat  
16 and massage. Maxwell was given a handout on a home exercise  
17 program. (A.R. 220) Bangle's treatment notes were reviewed and  
18 approved by David Silvestre, M.D. (*Id.*)

19 On November 21, 2007, Maxwell was admitted to a residential  
20 treatment program for chemical dependency at Hazelden, to address  
21 Maxwell's use of her husband's oxycodone pills, and addiction to  
22 marijuana. (A.R. 233; see A.R. 233-60) Maxwell reportedly had  
23 "been working with her husband and pastor to find the appropriate  
24 treatment for her chemical dependency," resulting in her admission  
25 to Hazelden. (A.R. 233) In discussing her current medical  
26 history, Maxwell stated she suffered from chronic back pain, which  
27 she believed may have stemmed from a 1977 whiplash injury in an  
28 auto accident. She had "lost clarity regarding her back pain, as

1 to whether it [was] legitimate back pain or [was] due to her  
2 addiction." (A.R. 243) Maxwell had tried muscle relaxants "just  
3 once earlier this spring," but felt the medications were not  
4 helpful and too expensive. (A.R. 233) She currently was taking  
5 400 mg to 800 mg of Ibuprofen two to three times daily for  
6 "adequate management." (*Id.*) Her admission diagnoses were history  
7 of substance use, opiate withdrawal, chronic back pain, and cough.  
8 (A.R. 235) Her current GAF was estimated at 40, indicating "some  
9 impairment in reality testing or communication, or major impairment  
10 in several areas such as work or school, family relations, judg-  
11 ment, thinking, or mood." *Bayliss v. Barnhart*, 427 F.3d 1211, 1217  
12 n.3 (9th Cir. 2005) (citing Am. Psychiatric Ass'n, *Diagnostic &*  
13 *Statistical Manual of Mental Disorders* 34 (4th T.R. ed. 2000)).

14 Maxwell stated her drug of choice was oxycodone, or other  
15 opiates. She reported "taking 5 milligram tablets, four or more in  
16 a day, up to a total of seven per day," for the past year, with her  
17 last use the day before her admission. (*Id.*) She reported taking  
18 "two to three puffs a night" of marijuana, about five nights per  
19 week. She used to drink five to six beers per day, but stated she  
20 really did not like alcohol, and her last drink was about a year  
21 before her admission. (*Id.*) An intake counselor opined that  
22 Maxwell had "a very simple and naive approach to what recovery is  
23 and believe[d] treatment [would] mean the end of her addiction."  
24 (A.R. 243) The counselor noted Maxwell was "naive and manipulative  
25 but [did] not appear malicious." (*Id.*) Maxwell reported smoking  
26 about a pack of cigarettes a day, and was "interested in  
27 cessation." (A.R. 234) She currently was a housewife, but stated  
28 she previously had worked as a grocery employee. (*Id.*) During her

1 psychological evaluation, Maxwell stated "her last job was working  
2 in an electronic assembly plant in Newburg," a job she lost "in  
3 June 2007 due to her difficulties mastering soldering skills after  
4 having taken a class in it." (A.R. 244) She further stated it was  
5 "sort of a relief" when she lost her job because she had been  
6 having problems working due to her back pain. (*Id.*)

7 For her back pain, Maxwell was started on methocarbamol 500  
8 mg., one to two three times daily, and Ibuprofen 500 mg. three  
9 times daily. She was referred to the "Chronic Pain Group and  
10 biofeedback," and was instructed to use heating pads. (A.R. 235)

11 Lab tests indicated Maxwell had an "[i]mpaired glucose  
12 tolerance," with her fasting glucose of 130 "just at the level of  
13 diabetes vs. pre-diabetes." (A.R. 237)

14 Maxwell "went to the Chronic Pain Group" on November 27, 2007,  
15 and reported "feeling overwhelmed with pain." (A.R. 238) She  
16 stated her pain level was 5 out of 10, and was "the same pain that  
17 caused her to start using." (*Id.*) She described daily pain that  
18 focused in different areas of her back, and she indicated the pain  
19 was "becoming 'exhausting.'" (*Id.*) Her Ibuprofen was increased to  
20 600 mg. three times daily. In addition, she was started on Chantix  
21 for smoking cessation. (*Id.*)

22 Psychological testing on November 27, 2007 (see A.R. 244-46),  
23 suggested Maxwell has "low average functioning in the verbal area,"  
24 and "below average functioning" in abstraction; "a borderline level  
25 of clinical depression"; no anxiety or social phobia symptoms; and  
26 "a mild level of obsessive-compulsive symptoms." (A.R. 245) Her  
27 performance on the MMPI-2 suggested "difficulties with thinking and  
28 concentration," and the likely presence of "significant psycho-

1 logical distress, despite [her] attempts to deny or repress  
2 problems." (*Id.*) The clinician noted typical symptoms for someone  
3 with Maxwell's psychological profile include "significant  
4 depression, as well as lowered activity level, apathy and  
5 helplessness. They are over-controlled and have difficulty  
6 expressing their feelings and tend to be dependent in relation-  
7 ships. They often grow accustomed to their chronic problems and  
8 continue to function at lowered levels of efficiency for long  
9 periods of time. Physical complaints, often with a histrionic  
10 quality, are likely." (*Id.*) Maxwell's diagnoses from the psycho-  
11 logical evaluation were chemical dependency, and dysthymic  
12 disorder. (A.R. 246) Her current GAF was estimated at 46, which  
13 is consistent with a person having "serious symptoms (e.g. suicidal  
14 ideation, severe obsessional rituals, frequent shoplifting) or any  
15 serious impairment in social, occupational, or school functioning  
16 (e.g., no friends, unable to keep a job)." *Morgan v. Comm'r*, 169  
17 F.3d 595, 598 n.1 (9th Cir. 1999).

18 On December 12, 2007, Maxwell met with a Nurse Practitioner  
19 "to discuss her medical discharge" from Hazelden. (A.R. 240)  
20 Maxwell was informed that test results were positive for Hepatitis  
21 C. She was encouraged to obtain genotyping and viral load, and  
22 they discussed management of the disease. She also was encouraged  
23 to get re-tested for diabetes in a few months. Maxwell was "very  
24 tearful when reflecting on what these diagnoses mean[t]." She was  
25 directed to follow up with a primary care provider in about a  
26 month. (*Id.*; see A.R. 253-54)

27 Maxwell was seen for an initial psychiatric assessment at  
28 Hazelden on December 17, 2007, apparently in preparation for



1 entering into extended day treatment. (See A.R. 257, 260) Her  
2 affect was noted to "range[] from mainly sad to euthymic." (A.R.  
3 248) She was relaxed, not overly anxious or agitated, and had  
4 fairly good insight and judgment. She was noted to be "highly  
5 motivated and hopeful about her first residential treatment."  
6 (*Id.*) Although she described periods of mild depression, the  
7 psychiatrist believed these could be "addressed with the tools from  
8 recovery and other nonmedication interventions." (A.R. 249)  
9 Maxwell's diagnoses mirrored those from her psychological  
10 evaluation; i.e., substance abuse and dysthymic disorder. Her  
11 current GAF was estimated at 50 (*id.*), continuing to indicate  
12 serious symptoms. See *McFarland v. Astrue*, 288 Fed. Appx. 357, 369  
13 (9th Cir. 2008) (unpublished)<sup>4</sup>; *Morgan, supra*.

14 Maxwell was discharged from Hazelden's residential program on  
15 December 18, 2007. Her GAF at discharge was estimated at 46,  
16 continuing to indicate serious symptoms. *Id.* She was advised to  
17 attend daily 12-Step meetings and get a Sponsor; participate in the  
18 Day Treatment program; and see the Hazelden psychologist weekly  
19 while in the treatment program. (A.R. 257; see A.R. 255-57)

20 On December 21, 2007, Maxwell was contacted by Hazelden staff.  
21 Maxwell "reported that she did not want to attend Extended Day Care  
22 Day Treatment. She was encouraged to reconsider this plan and talk  
23 about the pros and cons of attending, [but] she continued to report  
24 that she did not want to attend. She [felt] like she [had] enough  
25 recovery support through her church and the Celebrate Recovery

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27 <sup>4</sup>Unpublished Ninth Circuit cases referenced in this opinion  
28 are cited pursuant to Ninth Circuit Rule 36-3. See Fed. R. App. P.  
32.1(a).

1 program and that she [would] go to meetings daily." (A.R. 260) As  
2 a result, Maxwell was discharged from the Extended Care Day  
3 Treatment program "as of 12/24/07." (*Id.*)

4 On April 14, 2008, Neal E. Berner, M.D., a Family Practice  
5 specialist, provided a "Physical Summary" and opinion in connection  
6 with Maxwell's applications for disability benefits. He found  
7 Maxwell's "statements [were] not fully consistent." (A.R. 261)  
8 Dr. Berner noted that although Maxwell claims she has nearly  
9 constant back pain, objective findings have not revealed any  
10 weakness, loss of sensation, or loss of motion, and her pain  
11 "[i]mproves with hot bath and husband's Oxycontin." (*Id.*) He  
12 further noted Maxwell's back pain increases "when she thinks or  
13 talks about her prior abuse," and her "MMPI profile [is] consistent  
14 with physical complaints of histrionic quality." (*Id.*) He there-  
15 fore found Maxwell's physical complaints to be nonsevere. (*Id.*)

16 Also on April 14, 2008, clinical psychologist Dorothy  
17 Anderson, Ph.D. reviewed the record and completed a Psychiatric  
18 Review Technique form (A.R. 262-75), and a Mental Residual  
19 Functional Capacity Assessment form (A.R. 276-79) regarding  
20 Maxwell. Like Dr. Berner, Dr. Andersen found Maxwell's statements  
21 regarding her limitations were not fully consistent. She noted  
22 that although Maxwell reported difficulties remembering informa-  
23 tion, her mental status examinations failed to show any problems  
24 with memory or concentration, and she was able to complete testing  
25 and questionnaires. (A.R. 274) Dr. Anderson opined Maxwell would  
26 be able to understand and remember "simple/routine instructions/  
27 procedures," but she indicated "[d]eficits in concentration [would]  
28 limit [Maxwell's] ability to retain more complex instructions."

1 (A.R. 278) She opined Maxwell could "sustain attention to complete  
2 simple/routine tasks consistently," but she would need a "routine  
3 work setting that does not change frequently or rapidly[,] and due  
4 to Maxwell's drug use, she should avoid hazards and heights. (*Id.*)  
5 Dr. Anderson noted Maxwell's "[t]endency to focus on back pain  
6 limits [her] ability to interact with [the] general public. [She]  
7 [c]an interact when the setting is structured and does not require  
8 quick problem solving of more complex tasks. [She] [c]an be  
9 socially appropriate with coworkers/supervisors." (*Id.*)

10 On May 13, 2008, Maxwell saw a Physician's Assistant at  
11 Dr. Sims's office for followup of "chronic back pain, depression,  
12 and family stress." (A.R. 286) Maxwell was concerned about her  
13 recent diagnoses of Hepatitis C and prediabetes. Notes indicate  
14 Maxwell's back pain was "managed with NSAIDs." (*Id.*) The P.A.  
15 suggested Maxwell try an antidepressant for her depression and  
16 anxiety, but Maxwell declined the medication. (*Id.*)

17 On May 27, 2008, Maxwell called the VGMHC with a complaint of  
18 nausea. She stated she had received Tramadol from internal medi-  
19 cine specialist Dr. Robert A. Senft on May 20, 2008 (see A.R. 285),  
20 but by May 25, 2008, the medication had made her nauseous, and now,  
21 the medication was not strong enough to help her back pain.  
22 Maxwell stated she had taken 1600 mg. of Ibuprofen in the morning  
23 for pain. Dr. Senft advised her that the highest recommended  
24 dosage of Ibuprofen is 800 mg., and if Maxwell began having any  
25 abnormal symptoms, she should go to the ER immediately. Notes  
26 indicate Maxwell's chart would be given "to provider" with  
27 Maxwell's request for new pain medication. (A.R. 283)

1 On May 29, 2008, Maxwell called the VGMHC, reporting that she  
2 had been waiting for Dr. Senft to call and change her prescription  
3 from Tramadol "to something stronger." (A.R. 282) The doctor  
4 noted that due to Maxwell's history of chemical dependency, he did  
5 not recommend narcotic pain medications. He advised that Maxwell  
6 could take a combination of Ibuprofen, Tylenol, and Tramadol for  
7 pain control, but not to exceed the maximum recommended dosages of  
8 any medication. (A.R. 284)

9 On June 5, 2008, Maxwell saw Dr. Sims for a complaint of  
10 chronic back pain. Dr. Sims noted Maxwell was a "very poor his-  
11 torian regarding [her] back pain." (A.R. 280) Maxwell requested  
12 a prescription for Tramadol, which the doctor denied. (A.R. 280-  
13 81)

14 On July 9, 2008, Maxwell saw Dr. Sims for followup. She was  
15 referred to a specialist for evaluation of her Hepatitis C.  
16 Regarding her chronic lower back pain, Maxwell exhibited some  
17 tenderness of her back. She was directed to continue with her  
18 current medications. For her depression, Maxwell declined any  
19 medication and she was offered counseling. (A.R. 309)

20 Dr. Sims authored a letter dated July 15, 2008, regarding  
21 Maxwell's medical problems, stating as follows:

22 Ms. Maxwell is currently being seen in our  
23 medical clinic for the following conditions:

24 Chronic Low Back Pain with recent acute  
25 excacerbation [sic] and is on daily pain medi-  
26 cations. She has had physical limitations due  
27 to this especially with lifting, bending and  
28 prolonged standing and sitting.

Depression for which she has been recommended  
to undergo counseling sessions.

1           Hepatitis C. She is being referred to the  
2           liver specialist for this.

3           (A.R. 293)

4           On September 3, 2008, Sharon B. Eder, M.D., an internal  
5           medicine specialist, reviewed the record and prepared a Physical  
6           Summary in connection with Maxwell's request for reconsideration.  
7           Dr. Eder noted Maxwell's Hepatitis C was not symptomatic, and no  
8           doctor had recommended treatment currently for Hepatitis C or  
9           diabetes. She noted Maxwell complained of chronic lower back pain,  
10          but Maxwell was "noted to be [a] very poor historian," and she had  
11          no radiation to her lower extremities. Dr. Eder recommended  
12          affirmation of the previous denial of benefits. (A.R. 294)

13          On September 4, 2008, clinical psychologist Paul Rethinger,  
14          Ph.D. reviewed the record and prepared a Mental Summary in  
15          connection with Maxwell's request for reconsideration. He also  
16          recommended the prior denial of benefits be affirmed. (A.R. 295)

17          On February 2, 2009, seven months after her last visit,  
18          Maxwell saw a nurse in Dr. Sims's office for followup of her  
19          chronic back pain. Maxwell stated her current pain medications  
20          (Naproxen and Flexeril) were not working. Her pain continued to  
21          vary in intensity and location from day to day, with the primary  
22          pain located in her mid to upper back. On examination, Maxwell had  
23          good ranges of motion and no deformities. She exhibited minimal  
24          tenderness on the right side of her mid-back. Maxwell also com-  
25          plained of depression, but stated she did not want to take an  
26          antidepressant due to previous "bad experience" with Wellbutrin and  
27          lorazepam. The nurse noted Maxwell had a "somewhat flat affect."  
28          (A.R. 308) Maxwell was diagnosed with chronic back pain with a

1 "psychosomatic component." (*Id.*) She was started on Nortriptyline  
2 and Vicodin (hydrocodone). (*Id.*)

3 On March 4, 2009, x-rays were taken of Maxwell's lumbar spine.  
4 Findings showed "[m]ild diskogenic and facet degenerative changes,"  
5 with "[n]o fractures or dislocations . . . [or] foreign bodies."  
6 (A.R. 324)

7 On March 25, 2009, Maxwell saw Dr. Sims for followup of her  
8 chronic lower back pain. The doctor prescribed Vicodin (hydroco-  
9 done), one to two tablets twice daily as needed. She directed  
10 Maxwell to continue taking Nortriptyline, and indicated Maxwell  
11 would have to see a nurse to sign a narcotic contract. (A.R. 307)

12 Maxwell saw a nurse in Dr. Sims's office on May 5, 2009, for  
13 purposes of executing a pain contract. Maxwell stated she was  
14 "missing some pills" after leaving her bottle of Vicodin on the  
15 counter in the house, but she now was locking the medication in her  
16 glove compartment. (A.R. 306) She stated she was taking two pills  
17 twice daily as needed. Maxwell was advised that her last prescrip-  
18 tion stated it was to last for one month, but Maxwell stated she  
19 only had two pills remaining. She completed a medication history  
20 and opioid risk assessment, and was deemed a "moderate risk" with  
21 some problematic behavior. Notes indicate the nurse would consult  
22 with Dr. Sims regarding Maxwell's medication situation, with  
23 Maxwell to follow up with the doctor. (*Id.*)

24 Five months later, on October 12, 2009, Maxwell saw Dr. Sims  
25 for followup of persistent, chronic upper back pain. Notes indi-  
26 cate Maxwell was on a "pain contract." (A.R. 305) She had no back  
27 deformity, radiculopathy, or joint involvement. Maxwell indicated  
28 she was "very frustrated" because she could not get rid of her

1 pain. Dr. Sims opined Maxwell might have fibromyalgia. She also  
2 ordered thoracic x-rays to rule out any vertebral abnormality. She  
3 started Maxwell on Cymbalta for depression. (*Id.*)

4 Prescription records from VGMHC show Maxwell was prescribed  
5 Naproxen 500 mg. on January 26, 2009, to be taken as needed. On  
6 March 17, 2009, she was prescribed Nortriptyline 25 mg., but this  
7 was discontinued almost immediately. She then was prescribed  
8 Vicodin, 2 pills twice daily, receiving refills of 112 tablets each  
9 on May 5, June 2 and 30, and July 7, 2009. The Vicodin was  
10 discontinued on October 15, 2009, when Dr. Sims prescribed  
11 Oxycodone 5 mg., one pill three times daily. On November 9, 2009,  
12 the dosage was increased to one pill four times daily, and this was  
13 refilled on December 7, 2009. In addition, Maxwell began taking  
14 Cymbalta on October 19, 2009, with a refill on November 9, 2009.  
15 (A.R. 302)

16 Maxwell saw Dr. Sims on March 23, 2010, to discuss her pain  
17 medications. Maxwell stated "her Oxycodone [had] been stolen from  
18 her purse." (A.R. 333) She brought in an empty pill bottle from  
19 a prescription filled on March 9, 2010. Maxwell stated she had  
20 "been needing 6 tabs a day this last month due to increasing  
21 pains." (*Id.*) (The record does not indicate any doctor approved  
22 this increased dosage.) She had been out of the medication for  
23 four days and was "feeling miserable." (*Id.*) Maxwell reported  
24 that her pain was now centered mostly in her neck area, with  
25 radiation to both upper arms and on-and-off tingling. She denied  
26 any upper extremity weakness. Maxwell was noted to be "[c]rying,  
27 saying she need[ed] her meds so she [could] work." (*Id.*) Objec-  
28 tive examination revealed minimal spasm in her trapezius muscles.

1 The doctor ordered an MRI of Maxwell's cervical spine. She  
2 prescribed Flexeril, but noted the following regarding the  
3 narcotics:

4 Declined to refill lost Oxycodone.  
5 Lengthy discussion about how she has broken  
6 her contract. Changing her dose without first  
7 discussing with her [primary care provider],  
8 and then claiming to have it stolen. I will  
9 give her another chance, seeing that she does  
10 have a job that she is able to hold if her  
11 pain is manageable but I warned her that she  
12 will need to follow the contract. I will not  
13 increase her dose. She can continue to take  
14 Oxycodone 5 mgs, 1-2 tabs [twice daily] in  
15 addition to Naproxen and [as needed] Flexeril.  
16 She will need to come for an appointment in 1  
17 month.

18 (A.R. 334)

19 The MRI of Maxwell's cervical spine was done on March 26,  
20 2010. Findings showed no obvious lesions or ligamentous injury.  
21 There was "a moderate degree of narrowing of the left neural  
22 foramen" at C3-4; "some mild bony eburnation along the posterior  
23 aspect of the[] vertebral bodies" at C4-5, with no stenosis and  
24 normal neural foramina; and "mild bony eburnation along the  
25 posterior aspect of the[] vertebral bodies" at C6-7, with "a small  
26 tear in the posterior disc annulus." (A.R. 342) (The Record  
27 contains only the first page of the MRI report.)

28 On August 23, 2010, five months after her MRI, Maxwell saw a  
nurse in Dr. Sims's office, requesting a refill of lorazepam. The  
nurse observed that notes from Maxwell's last office visit  
indicated lorazepam had been discontinued. She consulted with  
Dr. Sims's medical assistant, who informed her "Dr. Sims explicitly  
stated no more lorazepam for this patient." (A.R. 331) Maxwell



1 also stated she was out of oxycodone, and the nurse advised Maxwell  
2 she would have to consult with Dr. Sims. (*Id.*)

3 Maxwell saw Dr. Sims on September 1, 2010, for followup of her  
4 chronic back pain. The doctor noted Maxwell had "been on Oxycodone  
5 for chronic back pains, which allowed her to be able to keep her  
6 job in a retail store. She reports that she has been approved for  
7 disability and that she was let go from her job due to  
8 disagreements with the store owner." (A.R. 332) Maxwell felt the  
9 narcotics were "making her feel not normal so she flushed them down  
10 the toilet and now she feels jittery and nervous from withdrawals."  
11 (*Id.*) She was taking NSAIDs, but still had some pain, at a level  
12 of 4 to 8 daily. She also was "trying to exercise more since she  
13 lost her job." (*Id.*) The doctor prescribed Ibuprofen 800 mg., one  
14 pill three times daily; Gabapentin 300 mg., increasing to one pill  
15 three times daily; and lorazepam .5 mg., one pill twice daily.  
16 (A.R. 332-33)

17 Maxwell saw Dr. Sims the next day<sup>5</sup> for "persistent anxiety  
18 issues." (A.R. 330) Notes indicate Maxwell "[s]truggles with  
19 chronic pain issues and insomnia, although reports that has been  
20 doing better on Ibuprofen. This is contradictory to her visit  
21 yesterday when she was asking for [refill] of both Lorazepam and  
22 Oxycodone." (*Id.*) Maxwell denied being depressed. The doctor  
23 prescribed a trial of Buspirone for anxiety. She also ordered a  
24 nerve conduction study due to Maxwell's complaint of "numbness and  
25

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26  
27 <sup>5</sup>The content of the progress notes from this visit indicate it  
28 was the day after Maxwell's previous visit, although these notes  
also are dated 9/10/10. Compare A.R. 330 with A.R. 332.

1 pain [in] both hands for years" (noting this was "the first time  
2 she ha[d] mentioned this."). (*Id.*)

3 On September 30, 2010, Maxwell saw Dr. Sims for followup of  
4 her chronic neck and lower back pain "due to arthritic and disc  
5 changes." (A.R. 329) Notes indicate Maxwell had decided to try  
6 being off of narcotics, but she had "been struggling with her  
7 pains," and "would like to be given another chance." (*Id.*)  
8 Examination revealed mild paravertebral spasms and mild neck  
9 spasms. The doctor prescribed a two-week trial of Oxycodone 5 mg,  
10 two tablets twice daily, and Cymbalta 60 mg., one pill twice daily.  
11 She ordered a drug screen panel. (*Id.*)

12 On October 6, 2010, Maxwell saw Dr. Sims to discuss Maxwell's  
13 urinalysis findings, which were positive for THC. Maxwell denied  
14 smoking marijuana, but stated she "may have been eating brownies  
15 that her exhusband admitted were laced with THC." (A.R. 327)  
16 Maxwell was "[c]rying[,] claiming that she cannot function without  
17 her Oxycodone. She is starting work next week and she is in pain  
18 all day." (*Id.*) She was diagnosed with chronic pain syndrome.  
19 The doctor indicated she would "give [Maxwell] another chance,"  
20 with more frequent urine tests. If the tests were negative, then  
21 the doctor would restart the Oxycodone. (*Id.*)

22 Maxwell underwent a nerve conduction study on October 7, 2010.  
23 The test revealed no evidence of carpal tunnel syndrome. (A.R.  
24 335)

25 / / /

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28 / / /

1 **B. Maxwell's Testimony**

2 **1. Hearing testimony**

3 At the outset, the ALJ explained to Maxwell that if she wanted  
4 to postpone the hearing so she could seek legal representation, the  
5 hearing would be rescheduled. Maxwell indicated she wanted to  
6 proceed with the hearing. (A.R. 26-28)

7 At the time of the hearing, Maxwell was 55 years old. She  
8 finished the tenth grade in school, and did not get a GED. (A.R.  
9 32) In the past, Maxwell worked in an electronics assembly job for  
10 a company she described as "building parts for like remote control  
11 TVs and stuff like that." (A.R. 33; see A.R. 244) The job  
12 required her to stand and do "a lot of walking," but did not  
13 require any lifting. (*Id.*) She also worked, in the late 1970s or  
14 early 1980s, as a raw fish packer for a seafood company and for a  
15 fishery. (A.R. 41-42)<sup>6</sup>

16 The ALJ noted Maxwell's medical records include records from  
17 inpatient substance abuse treatment. Maxwell indicated she no  
18 longer uses alcohol or any other drug except for prescribed  
19 medications. (*Id.*)

20 Maxwell stated she lives alone in a one-bedroom apartment.  
21 According to her, some type of social welfare organization called  
22 "White Cap" assisted her with rent and utilities for her apartment,  
23 and a case worker from the organization gave Maxwell a ride to the  
24 ALJ hearing. (A.R. 28, 35) Maxwell gets health care assistance  
25

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26  
27 <sup>6</sup>Although the ALJ did not elicit testimony about Maxwell's  
28 most recent position, it appears she worked as a checker at a  
grocery store. See A.R. 43, the VE's description of Maxwell's past  
relevant work; see also A.R. 234.

1 "through senior disability services in McMinnville," and she also  
2 gets food stamps. (A.R. 36)

3 Maxwell does her own grocery shopping. She walks to the  
4 grocery store, which is close to her apartment. She does not  
5 attend AA meetings frequently "because it's just a circus." (A.R.  
6 36) She attends church services, but does not participate in other  
7 activities. (*Id.*) She gets along with her seven brothers, but as  
8 far as getting along with members of the public, Maxwell stated she  
9 keeps to herself and does not socialize. She likes to grow house  
10 plants in small pots, and she reads the Bible. She occasionally  
11 visits her mother if one of her brothers picks her up and takes  
12 her. (A.R. 37) Although Maxwell is married, she and her husband  
13 are separated, and she has no contact with him. (*Id.*)

14 Maxwell stated the primary reason she is unable to work is  
15 back pain. She indicated Dr. Sims has told her "it's fibromyal-  
16 gia," and she also has "issues with depression." (A.R. 38)  
17 Maxwell stated her problems are equally physical and mental. (*Id.*)  
18 The ALJ noted Dr. Sims's indication that Maxwell has diabetes  
19 mellitus type II. Maxwell stated she is not on any medication for  
20 diabetes, and Dr. Sims has advised her to "work on losing 10  
21 pounds." (A.R. 39)

22 The ALJ indicated records from Dr. Sims ended in September  
23 2009, so he would obtain updated records from Dr. Sims. (A.R. 38-  
24 39) He had Maxwell sign a medical authorization for that purpose.  
25 (A.R. 46)

26 / / /

27 / / /

28 / / /

20 - FINDINGS & RECOMMENDATION

1 **2. Written testimony**

2 Maxwell completed a Function Report - Adult on January 30,  
3 2008. (A.R. 157-64) She described her daily activities as  
4 follows: "Wake up. Daily reading. Bath. Let dogs out. Read some  
5 more. Most days just be at home." (A.R. 157) She indicated she  
6 and her husband "help take care of each other." (A.R. 158) She  
7 cooks and washes dishes, spending about an hour-and-a-half daily on  
8 household work. (A.R. 158, 159) She gives the dogs food and  
9 water, and lets them outdoors as necessary. She indicated "they  
10 are little dogs 7-10 lbs. each." (A.R. 158) She prepares food  
11 daily, heating up "soups from [a] can," and sometimes making  
12 sandwiches or stews. She stated these activities take her longer  
13 than they used to because she has "low energy" and "pain in [the]  
14 side of [her] back." (A.R. 159)

15 Maxwell stated, "Some nights sleeping is a struggle. Pain is  
16 the reason." (A.R. 158) She indicated she used to be more active  
17 than she is able to be currently. (*Id.*) She has no problems with  
18 her personal care, and needs no reminders to take her medications.  
19 When she goes out, her husband usually goes with her. Although she  
20 knows how to drive, she indicated, "When I drive I feel a lot of  
21 pain in the side of my back/get nervoues [sic]/ feel unsure."  
22 (A.R. 160) She goes grocery shopping once a week, buying small  
23 amounts at a time. She can handle money, but indicated balancing  
24 a checkbook is "a struggle." (*Id.*)

25 Maxwell indicated she attends a 12-Step meeting about once a  
26 week, but "sitting long periods at a time cause[s] pain." (A.R.  
27 161) She prefers to have someone accompany her to the meetings.  
28 She stated she had noticed increasing pain, anxiety, and nervous-

1 ness over the past three years. (*Id.*) About twice a week, she  
2 talks with her mother and friends on the phone. (*Id.*) She has  
3 some problem getting along with her family because they disapprove  
4 of her marriage. (A.R. 162) She stated that due to her condition,  
5 she is "not active," doing only "what needs done." (A.R. 162)

6 Maxwell indicated her condition causes her problems with  
7 lifting, sitting, concentrating, understanding, and following  
8 instructions. She will not lift more than ten pounds. After  
9 sitting for about an hour, she needs to stand and walk around. She  
10 can only concentrate for short periods. She has difficulty  
11 understanding "some issues," and following instructions is "a  
12 struggle." (*Id.*) She can walk short distances, and then rests  
13 when she gets home. She can follow a recipe, but following written  
14 instructions at a workplace is "a struggle," and following  
15 detailed, spoken instructions is difficult for her. (*Id.*) She  
16 stated she was fired from her last job due to her inability to  
17 learn to solder, rather than from any problem getting along with  
18 people. (A.R. 163) Stress causes her "a lot of discomfort."  
19 (*Id.*) She is "OK with change," and she has some difficulty with  
20 learning. (*Id.*)

### 21 22 ***C. Third-Party Testimony***

23 Maxwell's husband Jack D. Maxwell, Jr. ("Jack") completed a  
24 third-party function report regarding Maxwell on January 29, 2008.  
25 (A.R. 149-56) He indicated Maxwell complains of pain daily. She  
26 helps him with his "sickness," and they "help take care of each  
27 other, . . . get[ting] through the day the best [they] can." (A.R.  
28

1 149-50) Maxwell helps feed their two dogs. Their daughters and  
2 church members help them with "anything they can." (A.R. 150)

3 Jack indicated Maxwell sometimes is unable to sleep due to  
4 pain. He indicated she has no problems with her personal care, and  
5 needs no reminders to take her medications. (A.R. 150-51)  
6 According to Jack, Maxwell prepares food daily, making "easy  
7 meals," but it takes her longer than it used to. He indicated  
8 Maxwell can do house cleaning chores, and "some laundry," but these  
9 tasks also take her longer than they used to. (A.R. 151)

10 When Maxwell goes out, her husband generally goes with her.  
11 Maxwell shops for groceries weekly. She can handle money without  
12 assistance. She goes to church weekly, occasionally attends a 12-  
13 Step meeting, and watches television. (A.R. 152-53) In Jack's  
14 opinion, Maxwell can follow written and spoken instructions, and  
15 she generally finishes what she starts. (A.R. 154) He indicated  
16 all of Maxwell's physical and mental functional abilities are  
17 affected by her condition, but he provided no explanation for this  
18 opinion, simply checking all of the available boxes on the form.  
19 (*Id.*) He indicated Maxwell handles changes in routine "OK," and  
20 she has a lot of stress but he does not know how well she handles  
21 it. (A.R. 155)

#### 22 23 ***D. Vocational Expert's Testimony***

24 Before questioning the VE, the ALJ explained to Maxwell about  
25 the type of information the VE would provide:

26 [E]verybody's jobs are described by the  
27 Department of Labor and there's three main  
28 parts to each job. One is a title, the second  
is what kind of physical requirement does it  
have as far as lifting, standing, carrying,

1 and you'll hear things called light or medium  
 2 or sedentary; and a third is what kind of  
 3 training or experience does it take to learn  
 4 to do a job or the doing. That's called a  
 5 skill level and that's converted into a  
 6 number, two, three, four.

7 (A.R. 40-41)

8 The VE described Maxwell's past relevant work as "[c]ashier  
 9 checker," a semi-skilled job classified as "light work per the  
 10 [Dictionary of Occupational Titles, or DOT]," with an SVP of 3<sup>7</sup>;  
 11 and electronics assembler, a semi-skilled, light job with an SVP of  
 12 4. (A.R. 43)

13 The ALJ asked the VE to consider an individual of Maxwell's  
 14 age, with her education and work experience, and the following  
 15 "non-exertional limitations":

16 Limiting to simple, routine instructions and  
 17 procedures. There's some limitation in inter-  
 18 acting with the general public and that should  
 19 be . . . in a structured setting and not  
 20 requiring quick problem solving. So basically  
 21 it would be . . . brief interaction and that's  
 22 about it with no public service job as such  
 23 like sales, for example. Probably the cashier  
 24 job would exceed that I'm assuming. And needs  
 25 a routine work setting that doesn't change  
 26 frequently or rapidly so pretty much . . . set  
 27 routine. It looks like the first job would  
 28 probably be precluded based on that I would  
 guess.

---

29 <sup>7</sup>Jobs are classified with an "SVP," indicating the level of  
 30 "specific vocational preparation" required to perform the job,  
 31 according to the *Dictionary of Occupational Titles*. The SVP "is  
 32 defined as the amount of lapsed time required by a typical worker  
 33 to learn the techniques, acquire the information, and develop the  
 34 facility needed for average performance in a specific job-worker  
 35 situation." *Davis v. Astrue*, slip op., 2011 WL 6152870, at \*9 n.7  
 36 (D. Or. Dec. 7, 2011) (Simon, J.) (citation omitted). "The DOT  
 37 identifies jobs with an SVP level of 1 or 2 as unskilled, jobs with  
 38 an SVP of 3 or 4 as semi-skilled, and jobs with an SVP of 5 or  
 higher as skilled." *Whitney v. Astrue*, slip op., 2012 WL 712985, at  
 3 (D. Or. Mar. 1, 2012) (Brown, J.) (citing SSR 00-4p).



1 (A.R. 43-44) The VE agreed the hypothetical individual could not  
 2 perform the grocery store cashier/checker job. (A.R. 44)

3 With regard to the electronics assembler job, the VE indicated  
 4 that with an SVP of 4, the job is semi-skilled, and probably would  
 5 be beyond the hypothetical individual's limitation to simple,  
 6 routine work. (*Id.*) The VE noted the DOT was last updated in  
 7 1989. The VE provided some opinion testimony related to "more  
 8 recent Department of Labor publications in the last couple years";  
 9 however, the VE's testimony contains several "(INAUDIBLE)" nota-  
 10 tions that make it impossible to determine what point the VE was  
 11 making regarding the more recent publications. (A.R. 44) The ALJ  
 12 responded, "Well, let's assume that, I always consider the  
 13 alternatives. Any other occupations around the (INAUDIBLE)?" It  
 14 appears the VE's testimony that followed was regarding other jobs  
 15 the hypothetical individual could perform that exist in significant  
 16 quantities in the regional and national economies.<sup>8</sup>

17 The VE listed the following jobs: "cleaner, commercial, insti-  
 18 tutional, . . . heavy work, SVP: 2, unskilled"; "laundry laborer  
 19 . . . medium work, SVP: 2, unskilled"; and "packager, hand, . . .  
 20 medium work, SVP: 2, unskilled." (A.R. 44-45) Considering only  
 21 jobs classified as "light work," the VE listed the following:  
 22 "assembly, machine tender, . . . SVP: 2, unskilled"; "office helper  
 23 . . . SVP: 2, unskilled"; and "cleaner, housekeeping, . . . SVP: 2,  
 24 unskilled." (A.R. 45)

---

25  
 26 <sup>8</sup>The ALJ indicated the VE testified Maxwell could perform her  
 27 past relevant work as an electronics assembler "as described in  
 28 more recent publications, . . . which describe the job as normally  
 performed after no more than 30 days of on-the-job training, or SVP  
 2." (A.R. 17)

1 The ALJ clarified with Maxwell that she feels unable to do a  
 2 "typical job" requiring "somewhere between 35 and 40 hours a week,  
 3 five days a week or 10 hours a day for four days a week, . . . full  
 4 time job." (*Id.*)

### 6 **III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF**

#### 7 **A. Legal Standards**

8 A claimant is disabled if he or she is unable to "engage in  
 9 any substantial gainful activity by reason of any medically  
 10 determinable physical or mental impairment which . . . has lasted  
 11 or can be expected to last for a continuous period of not less than  
 12 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

13 "Social Security Regulations set out a five-step sequential  
 14 process for determining whether an applicant is disabled within the  
 15 meaning of the Social Security Act." *Keyser v. Commissioner*, 648  
 16 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520). The  
 17 *Keyser* court described the five steps in the process as follows:

18 (1) Is the claimant presently working in a  
 19 substantially gainful activity? (2) Is the  
 20 claimant's impairment severe? (3) Does the  
 21 impairment meet or equal one of a list of  
 22 specific impairments described in the regula-  
 23 tions? (4) Is the claimant able to perform  
 any work that he or she has done in the past?  
 and (5) Are there significant numbers of jobs  
 in the national economy that the claimant can  
 perform?

24 *Keyser*, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,  
 25 1098-99 (9th Cir. 1999)); see *Bustamante v. Massanari*, 262 F.3d  
 26 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)  
 27 and 416.920 (b)-(f)). The claimant bears the burden of proof for  
 28 the first four steps in the process. If the claimant fails to meet

1 the burden at any of those four steps, then the claimant is not  
 2 disabled. *Bustamante*, 262 F.3d at 953-54; see *Bowen v. Yuckert*,  
 3 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119  
 4 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth  
 5 general standards for evaluating disability), 404.1566 and 416.966  
 6 (describing "work which exists in the national economy"), and  
 7 416.960(c) (discussing how a claimant's vocational background  
 8 figures into the disability determination).

9 The Commissioner bears the burden of proof at step five of the  
 10 process, where the Commissioner must show the claimant can perform  
 11 other work that exists in significant numbers in the national  
 12 economy, "taking into consideration the claimant's residual  
 13 functional capacity, age, education, and work experience." *Tackett*  
 14 *v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner  
 15 fails meet this burden, then the claimant is disabled, but if the  
 16 Commissioner proves the claimant is able to perform other work  
 17 which exists in the national economy, then the claimant is not  
 18 disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R.  
 19 §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

20 The ALJ also determines the credibility of the claimant's  
 21 testimony regarding his or her symptoms:

22 In deciding whether to admit a claimant's  
 23 subjective symptom testimony, the ALJ must  
 24 engage in a two-step analysis. *Smolen v.*  
 25 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).  
 26 Under the first step prescribed by *Smolen*,  
 27 . . . the claimant must produce objective  
 28 medical evidence of underlying "impairment,"  
 and must show that the impairment, or a combi-  
 nation of impairments, "could reasonably be  
 expected to produce pain or other symptoms."  
*Id.* at 1281-82. If this . . . test is satis-  
 fied, and if the ALJ's credibility analysis of  
 the claimant's testimony shows no malingering,

1           then the ALJ may reject the claimant's testi-  
2           mony about severity of symptoms [only] with  
3           "specific findings stating clear and con-  
4           vincing reasons for doing so." *Id.* at 1284.

5  
6           *Batson v. Commissioner*, 359 F.3d 1190, 1196 (9th Cir. 2004).

7  
8                           ***B. The ALJ's Decision***

9           The ALJ noted Maxwell's date last insured for purposes of the  
10          Social Security Act's requirements is December 31, 2007. (A.R. 12)  
11          He noted Maxwell has had some work activity since that date, with  
12          evidence suggesting she "may have earned over substantial amounts  
13          during part of the relevant period[.]" (*Id.*) Nevertheless, the  
14          ALJ gave Maxwell "the benefit of the doubt," finding she has not  
15          engaged in substantial gainful activity since her date last  
16          insured. (A.R. 12-13)

17          The ALJ made no finding of severity with regard to Maxwell's  
18          chronic back pain. He found Maxwell has severe impairments  
19          consisting of "dysthymic disorder, anxiety disorder NOS, and  
20          polysubstance abuse disorder in remission." (A.R. 13) However, he  
21          further found these impairments, singly or in combination, do not  
22          meet the Listing level of severity. He found Maxwell has only mild  
23          difficulties in social functioning; no restriction in her  
24          activities of daily living; moderate difficulties with regard to  
25          concentration, persistence, or pace; and no episodes of decompensa-  
26          tion of extended duration. (*Id.*) After considering the "paragraph  
27          B" and "paragraph C" criteria (see 20 C.F.R. pt. 404, subpt. P,  
28          app. 1, § 12.00(A), describing the "paragraph B" and "paragraph C"  
29          criteria), the ALJ concluded Maxwell has the following residual  
30          functional capacity ("RFC"):

31  
32          28 - FINDINGS & RECOMMENDATION

1 [T]he claimant has the residual functional  
2 capacity to perform a full range of work at  
3 all exertional levels but with the following  
4 nonexertional limitations: [she] can under-  
5 stand and remember simple, routine instruc-  
6 tions and procedures, can sustain concentra-  
7 tion and attention to complete simple, routine  
8 tasks consistently, can sustain limited inter-  
9 action with the general public, can interact  
10 in a structured setting that does not require  
11 quick problem-solving, needs a routine work  
12 setting that does not change rapidly, and  
13 should avoid hazards and heights due to drug  
14 use.

15 (A.R. 14) The ALJ found that with this RFC, Maxwell "is capable of  
16 performing [her] past relevant work as an electronics assembler,"  
17 which the ALJ recognized as light, semi-skilled work, with an SVP  
18 of 4. (A.R. 17) Alternatively, based on the VE's testimony, the  
19 ALJ further found Maxwell is able to perform other jobs that exist  
20 in the national economy, including "cleaner, commercial, institu-  
21 tional," and "packager, hand," each of which has an SVP of 2.  
22 (A.R. 18) In making these findings, the ALJ held that although  
23 Maxwell's medically-determinable impairments could cause some of  
24 the symptoms she alleges, Maxwell's and her ex-husband's statements  
25 concerning "the intensity, persistence and limiting effects of  
26 these symptoms" were not fully credible. (A.R. 15)

27 In support of his credibility finding, the ALJ noted the  
28 following:

- 29 • In January 2008, when Maxwell and her husband applied for  
30 disability benefits, the field office noted Maxwell  
31 "smelled of alcohol." Although Maxwell disputed that  
32 observation, she later stated she had "started a 12-step  
33 program in January 2008." (A.R. 14)
- 34 • Maxwell "cooks, washes dishes (for up to 90 minutes  
35 daily), takes care of her dogs, and has no problems with  
36 personal care. She asserted that she can lift 10 pounds  
37 and sit for an hour, and that she has trouble concen-  
38 trating. Despite these reports, [she] said that she

1 still works 25 to 30 hours per week 'when she feels good  
2 enough' as a cashier at a market." (A.R. 15; citations  
to exhibits omitted).

- 3 • Although Maxwell was advised to continue with individual  
4 therapy after she was discharged from treatment in late  
5 2007 or early 2008, she "decided not to attend the day  
6 treatment program," stating "she would have support  
7 through her church." (A.R. 16) In July 2008, she  
8 "declined antidepressants." (*Id.*)
- 9 • On two occasions, once in early 2009, and again in early  
10 2010, Maxwell stated her pain medications had gone  
11 missing, and she sought early refills. In October 2010,  
12 she tested positive for THC. She "denied smoking but  
13 said her ex-husband may have laced some brownies." (A.R.  
14 16-17)
- 15 • The State agency consulting physicians noted a lack of  
16 objective findings in the Record to substantiate  
17 Maxwell's claim of severe back pain. (A.R. 17)
- 18 • The State agency consulting psychologists noted Maxwell's  
19 lack of mental health counseling, and found Maxwell's  
20 mental functional abilities did not support her claim  
21 that she was disabled "as of December 31, 2007, the date  
22 last insured." (*Id.*)

23 The ALJ gave the State agency consultants' opinions "significant  
24 weight," finding them to be "well supported by medically acceptable  
25 clinical and laboratory diagnostic techniques and . . . not  
26 inconsistent with other substantial evidence in the case record."  
27 (*Id.*)

28 Because the ALJ found Maxwell able to work, he therefore found  
Maxwell had not been disabled at any time from December 31, 2001,  
through December 9, 2010, the date of his decision. (A.R. 19)

#### 29 **IV. STANDARD OF REVIEW**

30 The court may set aside a denial of benefits only if the  
Commissioner's findings are "'not supported by substantial evidence  
or [are] based on legal error.'" *Bray v. Comm'r of Soc. Sec.*  
*Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v.*

1 *Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black*  
 2 *V. Comm'r of Soc. Sec. Admin.*, slip op., 2011 WL 1930418, at \*1  
 3 (9th Cir. May 20, 2011). Substantial evidence is "more than a  
 4 mere scintilla but less than a preponderance; it is such relevant  
 5 evidence as a reasonable mind might accept as adequate to support  
 6 a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035,  
 7 1039 (9th Cir. 1995)).

8 The court "cannot affirm the Commissioner's decision 'simply  
 9 by isolating a specific quantum of supporting evidence.'" *Holohan*  
 10 *v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett*  
 11 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court  
 12 must consider the entire record, weighing both the evidence that  
 13 supports the Commissioner's conclusions, and the evidence that  
 14 detracts from those conclusions. *Id.* However, if the evidence as  
 15 a whole can support more than one rational interpretation, the  
 16 ALJ's decision must be upheld; the court may not substitute its  
 17 judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v.*  
 18 *Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

## 19 20 **V. DISCUSSION**

### 21 **A. Duty to Develop the Record**

22 Maxwell argues the ALJ failed in his duty to develop the  
 23 Record fully and fairly, and violated Maxwell's right to procedural  
 24 due process when he admitted exhibits into the Record subsequent to  
 25 the hearing without giving Maxwell an opportunity to object to or  
 26 comment on those exhibits. Dkt. #14, pp. 6-7. Addressing the  
 27 latter argument first, the court notes the ALJ sent Maxwell a  
 28 letter dated November 15, 2010, informing her of the additional

1 evidence he had secured and proposed entering into the Record, and  
2 advising her of her right to make written comments, submit  
3 additional records, submit written questions for the authors of the  
4 new exhibits, or even request a supplemental hearing at which she  
5 could question the authors of the records and call additional  
6 witnesses. (A.R. 216-17) There is no evidence that Maxwell  
7 exercised any of these rights with regard to the additional  
8 exhibits. The court finds the ALJ did not violate Maxwell's right  
9 to procedural due process in admitting the post-hearing exhibits  
10 into the Record.

11 Turning to Maxwell's argument that the ALJ failed to develop  
12 the Record adequately, the parties agree with the general principle  
13 that, "[i]n Social Security cases, the ALJ has a special duty to  
14 fully and fairly develop the record and to assure that the  
15 claimant's interests are considered.'" *Hayes v. Astrue*, 270 Fed.  
16 Appx. 502, 504 (9th Cir. 2008) (unpublished) (quoting *Brown v.*  
17 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983) (per curiam)); see Dkt.  
18 #14, p. 6; Dkt. #16, p. 4. "This duty exists even when the  
19 claimant is represented by counsel," and is heightened when a  
20 claimant is unrepresented. *Id.* Fulfilling this duty may require  
21 the ALJ to consult a medical expert or to obtain a consultative  
22 examination. *Loeks v. Astrue*, slip op., 2011 WL 198146, at \*5 (D.  
23 Or. Jan. 18, 2011) (Haggerty, J.) (citing 20 C.F.R. §§ 404.1519a &  
24 416.919a).

25 "Relatedly, an ALJ must take reasonable steps to ensure that  
26 issues and questions raised during the presentation of medical  
27 evidence are addressed so that the disability determination is  
28 fairly made on a sufficient record of information." *Id.* (citing



1 *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1999); 20 C.F.R.  
2 §§ 404.1527(c)(3) & 416.927(c)(3) ("explaining how an ALJ may  
3 obtain additional evidence where medical evidence is insufficient  
4 to determine whether claimant is disabled"); 20 C.F.R.  
5 §§ 404.1512(e) and 416.912(e) ("obtaining additional information  
6 from treating doctors")). However, if the record evidence is  
7 unambiguous, and is sufficient to allow for proper evaluation, then  
8 the duty to develop the record further is not triggered. *Id.*  
9 (citing *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001));  
10 *Frampton v. Astrue*, slip op., 2010 WL 373867, at \*13 (D. Or. Jan.  
11 29, 2010) (Mosman, J.) (same).

12 Maxwell argues the ALJ picked out items in the documentary  
13 evidence that were detrimental to her claim, and failed to develop  
14 evidence supporting her claim. As an example, she points to  
15 Dr. Sims's October 12, 2009, treatment note indicating Maxwell has  
16 "chronic pain prob[able] Fibromyalgia[.]" (A.R. 305) In July  
17 2008, Dr. Sims indicated Maxwell's chronic low back pain had  
18 resulted in "physical limitations . . . especially with lifting,  
19 bending and prolonged standing and sitting." (A.R. 293) Maxwell  
20 argues these statements should have prompted the ALJ to obtain "a  
21 consultative examination to determine the degree of functional  
22 limitation related to [her] pain and/or [her] fibromyalgia." Dkt.  
23 #14, p. 7.

24 The ALJ gave "significant weight" to the opinions of the non-  
25 examining State agency consultants, rendered in April and September  
26 2008, indicating Maxwell's chronic back pain was "nonsevere . . .  
27 due to the lack of objective findings in the record." (A.R. 17;  
28 see A.R. 261, 294) Regarding the medical evidence post-dating the

1 State agency consultants' opinions, including Dr. Sims's October  
2 2009 treatment note, the ALJ noted the following:

3 [A]fter discharge from drug and alcohol  
4 treatment, [Maxwell] was seen for back pain at  
5 [VGMHC]. Despite her recent drug treatment,  
6 she was given pain medications. She had  
7 reported limitations on bending, lifting, and  
8 prolonged standing. She also had "depression  
9 for which she has been recommended to undergo  
10 counseling sessions." . . .

11 [She] returned to this clinic in May 2008 with  
12 chronic back pain and social stress. . . .  
13 Although the chart notes indicate her history  
14 of drug and alcohol treatment, she was given  
15 Ultram and Tramadol and told to follow up in a  
16 year. [Maxwell] called shortly thereafter  
17 stating that the Tramadol was not strong  
18 enough and was told that if she wanted some-  
19 thing else an appointment would be needed. In  
20 July 2008, [she] declined antidepressants and  
21 was offered counseling.

22 In early 2009, [Maxwell] reported that her  
23 back pain varied in location and intensity day  
24 to day. She said her current medications were  
25 not helping much. She was assessed with  
26 chronic back pain with a likely somatic compo-  
27 nent and given Vicodin. She reported good  
28 pain control with Vicodin. . . . A March 2009  
spinal view showed mild lumbar degenerative  
changes[.]

[Maxwell] returned in October 2009 with upper  
back pain and was becoming depressed about her  
pain issues. She was assessed with chronic  
pain, probable fibromyalgia, and depression  
secondary to the pain. She was on oxycodone  
by that point.

In November 2009, [Maxwell] had a well woman  
exam and stated that she worked part-time at  
Peoples Market. She complained of low back  
pain and was given Cymbalta and oxycodone.

A March 2010 MRI of the cervical spine showed  
some moderate narrowing of the left neural  
foramen at C3-4, some mild bony eburnation at  
C4-5 and C6-7, and a small tear in the  
posterior disc annulus at C6-7. [Maxwell]  
reported that her oxycodone had been stolen  
from her purse and was counseled that she had  
broken her pain contract and would not be

1           given medication. She was crying, stating  
2           that she needs her medication to work; she was  
3           doing a lot of lifting at the convenience  
4           store. . . .

5 (A.R. 16-17; citations to exhibits omitted). Thus, the ALJ did, in  
6 fact, consider evidence that Maxwell suffers from chronic back  
7 pain. He found, however, that Maxwell's ability to perform work at  
8 all exertional levels was not compromised by any physical limita-  
9 tions. The ALJ's conclusion in this regard is supported by  
10 Maxwell's reported activities, including part-time work; by the  
11 lack of findings showing her back pain arose from any significant  
12 abnormality, injury, or other condition; and by her self-reports  
13 that with medication, she was able to work and function without  
14 limitations. Further, one mention by a doctor that Maxwell might  
15 have fibromyalgia is not enough to trigger the ALJ's duty to obtain  
16 further examinations or testing. Dr. Sims did not order further  
17 testing herself, or refer Maxwell to a specialist, and the doctor's  
18 notes do not indicate the presence of objective findings, or even  
19 the presence of "trigger points" or other subjective criteria, to  
20 support such a diagnosis.

21           Maxwell argues the State agency consultants' opinions cannot,  
22 standing alone, "'constitute substantial evidence that justifies  
23 the rejection of the opinion of either an examining physician or  
24 treating physician.'" Dkt. #14, p. 10 (quoting *Lester v. Chater*,  
25 81 F.3d 821, 831 (9th Cir. 1995)). While a correct statement of  
26 law, this observation is irrelevant here, where there is no opinion  
27 from any of Maxwell's physicians - either in report form or even as  
28 a suggestion in the treatment notes - that Maxwell has disabling  
limitations that would prevent her from working. Dr. Sims's letter

1 dated July 15, 2008, indicated Maxwell's chronic back pain has  
2 caused her "physical limitations . . . especially with lifting,  
3 bending and prolonged standing and sitting." (A.R. 293) However,  
4 the doctor's letter appears to simply recite the limitations  
5 Maxwell had self-reported when she began treatment with Dr. Sims,  
6 and the doctor's treatment notes only indicate occasional findings  
7 of mild tenderness and muscle spasms in Maxwell's back. Again, per  
8 Maxwell's own statements, with the help of her medications she is  
9 able to function adequately, including working at a job that  
10 requires "a lot of lifting." (A.R. 16-17)

11 The court finds the Record evidence was sufficient to allow  
12 for proper evaluation, and thus, the ALJ did not have a duty to  
13 develop the record further regarding Maxwell's back pain or  
14 possible fibromyalgia diagnosis. While the Record contains  
15 evidence that Maxwell suffers from chronic back pain, the evidence  
16 does not support her claim that her back pain is disabling. The  
17 Record contains substantial evidence to support the ALJ's  
18 determination that Maxwell does not have a physical impairment that  
19 would compromise her ability to work at any exertional level.

20  
21 ***B. Residual Functional Capacity and Step Four Finding***

22 Maxwell also argues at some length that the ALJ erred at step  
23 four in finding Maxwell is able to return to her past relevant work  
24 as an electronics assembler, both as Maxwell performed the job and  
25 as it is normally performed. Dkt. #14, pp. 11-14. As the ALJ  
26 noted, before considering, at step four of the sequential evalua-  
27 tion process, whether a claimant can return to her past relevant  
28 work, the ALJ first must determine the claimant's RFC. (A.R. 11,

1 citing 20 C.F.R. §§ 404.1520(e) & 416.920(e)). Maxwell argues the  
2 ALJ's RFC determination contains significant functional limitations  
3 that are not defined in, and thus "conflict with," the *DOT*. Dkt.  
4 #14, pp. 12-19. She argues the ALJ erred in failing to have the VE  
5 discuss how the functional limitations identified in the ALJ's RFC  
6 determination related to each of the jobs the VE identified. She  
7 therefore argues the ALJ erred in relying on the VE's testimony in  
8 finding she is able to return to her past work as an electronics  
9 assembler.

10 Maxwell isolates, for discussion, certain terms and phrases  
11 contained in the ALJ's RFC determination as indicated by the  
12 numbers in brackets, below:

13 [Maxwell] has the residual functional capacity  
14 to perform a full range of work at all  
15 exertional levels but with the following non-  
16 exertional limitations: [she] can understand  
17 and remember simple, routine instructions and  
18 procedures, [1] can sustain concentration and  
19 attention to complete simple, routine tasks  
20 consistently, can sustain limited interaction  
with the general public, [2] can interact in a  
structured setting [3] that does not require  
quick problem-solving, [4] needs a routine  
work setting that does not change rapidly, and  
[5] should avoid hazards and heights due to  
drug use.

21 (A.R. 14; see Dkt. #14, pp. 12-18).

22 Regarding phrase [1], Maxwell asserts the *DOT* does not address  
23 the terms "sustain" or "consistently," as related to an indi-  
24 vidual's "ability to maintain attention and concentration," instead  
25 addressing "the ability to perform tasks on an occasional, frequent  
26 or constant basis." Dkt. #14, p. 16 & n.7 (citing *DOT* App. C  
27 p. 1013 (4th ed. 1991)). She argues the ALJ's use of the terms  
28 "sustain" and "consistently," rather than the accepted designation

1 of "occasional, frequent or constant," is in conflict with the *DOT*,  
2 and the "conflict . . . is not explained." *Id.* Regarding phrases  
3 [3] and [4], Maxwell similarly argues the *DOT* does not address the  
4 speed or quickness of problem-solving required for a job, or  
5 whether a work setting is "routine" or changes "rapidly." *Id.*,  
6 p. 17. She further argues the ALJ's indication that she could  
7 "interact in a structured setting" (phrase [2]) required explora-  
8 tion with the VE because a structured setting often refers to  
9 "sheltered work shops." *Id.* She argues the ALJ erred in failing  
10 to have the VE explain how the jobs he identified met all of these  
11 criteria that differ from the terminology used in the *DOT*. *Id.*,  
12 pp. 15-17.

13 An ALJ is not permitted to rely on a VE's testimony regarding  
14 jobs an individual can perform "without first inquiring whether the  
15 testimony conflicts with the *DOT*." *Massachi v. Astrue*, 486 F.3d  
16 1149, 1152 (9th Cir. 2007) (citing, *inter alia*, SSR 00-4P,  
17 available at 2000 WL 1898704, and cases from the Third, Seventh,  
18 and Tenth Circuits). Here, the ALJ asked the VE to point out "any  
19 differences of opinion [the VE had] on the way jobs are performed  
20 in [the VE's] experience versus the way they're described in the  
21 *DOT*." (A.R. 41)

22 The VE identified and discussed such a variation from the *DOT*  
23 with regard to the SVP of the electronics assembler job. The *DOT*  
24 assigns the electronics assembler job an SVP of 4. Under the *DOT*  
25 definition, a person with level 4 reasoning development will have  
26 the ability to "[a]pply principles of rational systems to solve  
27 practical problems and deal with a variety of concrete variables in  
28 situations where only limited standardization exists[,] and

1 "[i]nterpret a variety of instructions furnished in written, oral,  
2 diagrammatic, or schedule form. (Examples of rational systems  
3 include: bookkeeping, internal combustion engines, electric wiring  
4 systems, house building, farm management, and navigation.)." *DOT*,  
5 App. C, § III. As one court has observed, "The Ninth Circuit has  
6 not determined whether an RFC limiting an individual to 'simple'  
7 jobs is inconsistent with a position involving Level 3 or higher  
8 DOT reasoning capacity." *VonBeuelow v. Astrue*, 2013 WL 990414, at  
9 \*2 (C.D. Cal. Mar. 12, 2013). The ALJ's limitations to "simple,  
10 routine instructions and procedures," and "simple, routine tasks"  
11 would appear to be inconsistent with the *DOT*'s description of level  
12 4 reasoning. However, the VE testified that more recent publica-  
13 tions from the U.S. Department of Labor and the Oregon Employment  
14 Department indicate the electronics assembler job, "as actually  
15 performed," requires only level 2 reasoning. (See A.R. 17, 44)  
16 "[A] claimant who is limited to 'simple, routine tasks and instruc-  
17 tions' is capable of performing a job requiring Level Two reason-  
18 ing." *Patton v. Astrue*, slip op., 2013 WL 705909, at \*1 (D. Or.  
19 Feb. 25, 2013) (Brown, J.); see *Abew v. Astrue*, 303 Fed. Appx. 567,  
20 569 (9th Cir. 2008) (unpublished) (finding no conflict between  
21 ALJ's RFC determination that claimant could perform "only simple  
22 tasks" and VE's testimony that he could do jobs with SVP2). There-  
23 fore, the ALJ's reliance on the VE's testimony that Maxwell can  
24 perform a job with an SVP of 2 is supported by substantial  
25 evidence.

26 Although the VE did not identify other inconsistencies between  
27 the *DOT* and the ALJ's RFC findings, the court finds the "incon-  
28 sistencies" identified by Maxwell are not the types of deviations

1 about which the ALJ had a duty to inquire. The RFC determination  
2 uses clear, ordinary words that are easily understood. *Cf.*  
3 *McCutcheon v. Astrue*, 378 Fed. Appx. 649, 651 (9th Cir. 2010)  
4 (unpublished) (the court "can draw 'specific and legitimate  
5 inferences from the ALJ's opinion'" (quoting *Magallanes v. Bowen*,  
6 881 F.2d 747, 755 (9th Cir. 1989)). The VE gave no indication that  
7 he did not understand the ALJ's use of these common terms. ALJs  
8 regularly use terms such as "sustain," "routine," and "consis-  
9 tently" in their RFC determinations. *See, e.g.* (all emphases  
10 added), *Fern v. Colvin*, slip op., 2013 WL 1326605, at \*2 (D. Or.  
11 Mar. 28, 2013) (claimant "could perform **routine**, repetitive tasks  
12 with simple instructions"); *Berreth v. Colvin*, slip op., 2013 WL  
13 1294712, at \*2 (D. Or. Mar. 26, 2013) (claimant was "limited to  
14 simple, **routine** tasks"); *Horton v. Comm'r, SSA*, slip op., 2013 WL  
15 1183308, at \*2 (D. Or. Mar. 21, 2013) (claimant "could perform  
16 simple, **routine**, repetitive tasks"); *Hudson v. Astrue*, slip op.,  
17 2013 WL 474799, at \*7 (D. Or. Jan. 7, 2013) ("the RFC is by  
18 definition an assessment of a claimant's ability to **sustain** full  
19 time work activity"); *Boone v. Comm'r, SSA*, 2013 WL 1942157, at \*1  
20 (D. Md. May 8, 2013) (claimant "should be afforded the opportunity  
21 to sit for 30 minutes and stand for 30 minutes **consistently**"). The  
22 regulations, themselves, refer to "structured settings" without  
23 further explanation, indicating a claimant's degree of functional  
24 limitation will be determined by considering, *inter alia*, "chronic  
25 mental disorders, **structured settings**, medication and other treat-  
26 ment." 20 C.F.R. §§ 404.1520a(c) & 416.920a(c) (emphasis added).

27 The court finds the ALJ did not err in failing to have the VE  
28 discuss how the jobs the VE identified matched up with the specific



1 terminology used by the ALJ in his RFC determination. The court  
2 further finds substantial evidence supports the ALJ's determination  
3 that Maxwell could return to her past relevant work as an  
4 electronics assembler.

5  
6 ***C. Step Five Findings***

7 Maxwell further argues the ALJ erred in finding she can  
8 perform "other jobs that exist in significant numbers in the  
9 national economy." (A.R. 18) In particular, Maxwell argues the  
10 three jobs identified by the ALJ involve "hazards" that would make  
11 them inconsistent with phrase [5] that she identified in the ALJ's  
12 RFC determination (i.e., that she "should avoid hazards and heights  
13 due to drug use"). Dkt. #14, pp. 18-19. The Commissioner argues  
14 the ALJ's step five findings were "immaterial," and only "an  
15 alternative, discretionary undertaking," because the ALJ correctly  
16 determined Maxwell could return to her past relevant work. Dkt.  
17 #16, p. 11.

18 The Commissioner is correct. Having found Maxwell is able to  
19 return to her past relevant work, the burden of proof never shifted  
20 to the Commissioner, and no further analysis was required. A  
21 claimant who can still perform past relevant work is not disabled.  
22 20 C.F.R. §§ 404.1520(f) & 416.920(f).

23  
24 ***VI. CONCLUSION***

25 Substantial evidence supports the ALJ's decision that Maxwell  
26 is not disabled. The undersigned therefore recommends the Commis-  
27 sioner's decision be affirmed.

1                                    **VII.    SCHEDULING ORDER**

2            These Findings and Recommendations will be referred to a  
3 district judge. Objections, if any, are due by **August 5, 2013**. If  
4 no objections are filed, then the Findings and Recommendations will  
5 go under advisement on that date. If objections are filed, then  
6 any response is due by **August 22, 2013**. By the earlier of the  
7 response due date or the date a response is filed, the Findings and  
8 Recommendations will go under advisement.

9            IT IS SO ORDERED.

10                                   Dated this 16th day of July, 2013.

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13                                   /s/ Dennis James Hubel  
14                                   Dennis James Hubel  
                                     Unites States Magistrate Judge  
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